"'promote form over substance'" to review them on a disaggregated basis." Id. (quoting Sprint Communications Co. v. FCC, 274 F.3d 549, 561 (D.C. Cir. 2001)).[36]

So too here. CLECs do not order the installation of a DS1 EEL for its own sake. Rather, they order that installation for the purpose of serving a particular customer, usually for a particular minimum period of time. See Triennial Review Order[37] ¶ 421 (customers served by DS1 loops "are more willing to enter long-term contracts, allowing competitive LECs a greater ability to recover the nonrecurring costs associated with providing service"). It would thus "promote form over substance" to consider the NRCs of that EEL in isolation, without considering the recurring rate as well. And, because Illinois Bell's recurring and nonrecurring rates for a new DS1 EEL together fall comfortably within the range that a CLEC would pay elsewhere, those rates must be considered reasonable.

That is especially so, moreover, in light of the fact that the challenged NRCs are interim. The ICC has specifically identified the NRCs that Globalcom places at issue as subject to reexamination, and, contrary to Globalcom's contention (at 14-17), Illinois Bell expects that reexamination to proceed irrespective of the outcome of the litigation (discussed above) relating to the Illinois General Assembly's authority to set standards for loop rate inputs. See Wardin

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[36] Similarly, in approving SWBT's nonrecurring charges for UNE-P in Kansas, the Commission noted evidence demonstrating that, when "amortized over the period of time that a competitive LEC would likely have a continuing business relationship with an end user," the nonrecurring costs in question yielded "total monthly costs" – i.e., recurring plus nonrecurring – "less than for a competitive LEC operating in a comparable-sized exchange in Texas." Kansas/Oklahoma Order ¶ 61 n.171.

[37] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, et al., FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order").

Reply Aff. ¶ 23, 25-26. Interim rates, the Commission has explained, "are a sufficient basis for granting a section 271 application" where the rates are "reasonable under the circumstances, where the state commission has demonstrated its commitment to [the Commission's] pricing rules, and provision is made for refunds or true-ups once permanent rates" are established. E.g., Texas Order ¶ 241. Each of these requirements is satisfied here. As explained above, the NRCs at issue are reasonable under the "circumstances" – which, again, include the failure of any party to object to them before the ICC. E.g., Wardin Reply Aff. ¶ 18. As demonstrated throughout this Application, the ICC has demonstrated its commitment to the Commission's pricing rules. And, as noted in the Reply Affidavit of W. Karl Wardin (¶ 19), the interim rates at issue are subject to true-up.

The adequacy of these interim rates is in no way undermined by Illinois Bell's filing of cost studies that, in some respects, propose costs lower than the rates Illinois Bell is charging today. See Globalcom Comments at 12-13. For one thing, those same cost studies in many related respects show costs that are *higher* than what Illinois Bell is charging today. See Wardin Reply Aff. ¶ 29. Thus, if the cost studies alone are to be dispositive, then it must be the case that Illinois Bell's rates are in many respects too low. And, in any case, as the D.C. Circuit has explained, far from being dispositive, those cost studies are irrelevant:

> [A] state's TELRIC rates could not always reflect the most recently available information, since rate determinations consume substantial periods of time and cannot be constantly undertaken. Indeed, a process of Penelope-like unraveling and reinvention would, like hers, prove endless. And in upholding TELRIC, the Supreme Court affirmatively invoked the likelihood of a regulatory lag, saying that such a lag would prevent TELRIC prices from dropping so low as to unduly tempt CLECs to rely on ILEC-supplied UNEs rather than build their own facilities.

WorldCom, Inc. v. FCC, 308 F.3d 1, 8 (D.C. Cir. 2002) (citation omitted). Thus, under binding precedent, Illinois Bell's proposed costs in no way undermine the reasonableness of its ICC-approved NRCs for new DS1 EELs.

Finally, in an effort to resolve this issue on a business-to-business basis, Illinois Bell has offered to charge Globalcom, on an interim basis and subject to true up, the nonrecurring rates for the EEL in question in accordance with the proposed rates that, as Globalcom itself emphasizes, Illinois Bell filed with the ICC. See Wardin Reply Aff. ¶¶ 40-41. Here too, then, Illinois Bell has responded to criticism in the record in a manner intended to address the needs of its wholesale customers and to facilitate competition. See supra pp. 54-55 & n.32. This step underscores the reasonableness of Illinois Bell's nonrecurring EEL charges and further supports a finding that those charges comply with Checklist Item 2 and Commission precedent.

4. Additional Pricing Claims

The few additional pricing-related issues raised in this proceeding are likewise insufficient to rebut the BOC Applicants' showing of checklist compliance.

First, Z-Tel broadly contends that SBC is "discriminating" among CLECs by charging different rates to different CLECs. Z-Tel Comments at 4-6; see also DOJ Eval. at 17. But Z-Tel can point to no portion of the statute or Commission precedent suggesting that SBC must necessarily charge every CLEC the lowest rate for every element, regardless of the language in the CLECs' interconnection agreements. In the absence of such a showing, Z-Tel's allegations fail to rebut the BOC Applicants' showing of compliance on any checklist item. See, e.g., California Order, App. C, ¶ 4 ("disputes over an incumbent LEC's precise obligations . . . that FCC rules have not addressed and that do not involve *per se* violations of self-executing

requirements of the Act" are not germane to the Commission's section 271 review); Maryland/D.C./West Virginia Order ¶ 22 ("the Act authorizes the state commissions to resolve specific carrier-to-carrier disputes arising under the local competition provisions"); see also Alexander Reply Aff. ¶¶ 46-48.[38]

Second, and relatedly, the IURC conditions its support of Indiana Bell's application on this Commission's conclusion that Indiana Bell's challenge to a state tariffing requirement does not call into question Indiana Bell's "'concrete and specific legal obligation'" to offer interconnection and UNEs at IURC-approved rates. See IURC Comments at 3-4 (quoting Michigan Order ¶ 110).

The challenge to which the IURC refers is Indiana Bell's federal court appeal of the IURC order mandating that Indiana Bell tariff all UNEs and interconnection terms, apparently so that CLECs may purchase them off-the-shelf, rather than through an interconnection agreement. See Butler Aff. ¶ 61 & n.39 (citing Cause No. 40611, Indiana Bell Tel. Co. v. IURC, Case IP01-0219-C-Y/S (S.D. Ind. filed Feb. 16, 2001)). Significantly, Indiana Bell's challenge is intended to *preserve* the viability of the "concrete and specific legal obligations" contained in the interconnection agreements it negotiates and arbitrates under the 1996 Act. As the Seventh Circuit recently explained, a tariff requirement of the sort in place in Indiana "interfere[s] with the procedures established by the federal act." Wisconsin Bell, Inc. v. Bie, Nos. 02-3854 & 02-

[38] Z-Tel also contends that SBC Midwest fails to adhere to the modification procedures in its interconnection agreements, by insisting on "impermissible" language in exchange for lowering the rates in Z-Tel's agreements. See Z-Tel Comments at 8. This claim appears to be moot, as Z-Tel and SBC Midwest appear to have resolved – at least in principle – the dispute that gave rise to it. See Alexander Reply Aff. ¶ 40. In any event, this claim is premised on an inaccurate and incomplete characterization of the business-to-business negotiations between SBC and Z-Tel. See id. ¶¶ 49-51.

3897, 2003 WL 21911195, at *3 (7th Cir. Aug. 12, 2003). Accordingly, even if Indiana Bell is successful in that appeal, it will remain bound by its interconnection agreements themselves, which furnish the requisite "concrete and specific legal obligations" to offer UNEs and interconnection at IURC-approved rates on which Indiana Bell relies in this Application. See Alexander IN Aff. ¶ 7.

Finally, ACN objects to the interim status of Illinois Bell's rates for dark fiber, subloops, and the CNAM database. ACN et al. Comments at 35. Interestingly, ACN cites comments provided by ICC staff in the Illinois state proceeding to support its challenge. See id. It was on the basis of these comments (and others like them) that the ICC required Illinois Bell to lower its CNAM database query rate, as well as certain recurring and nonrecurring subloop rates. See Wardin Reply Aff. ¶¶ 67-70; Wardin Aff. ¶ 11d, f. With these adjustments, the ICC has expressly found that these interim rates – as well as the interim rate for dark fiber – are reasonable. See Wardin Aff. ¶ 18 & n.25 (citing ICC Final Order ¶¶ 887-889). ACN provides no reason for this Commission to reach a contrary conclusion. Moreover, each of these rates is subject to true-up to the resolution of now-pending rate investigations. See id. ¶ 18. The interim nature of these rates accordingly provides no basis on which to question Illinois Bell's checklist compliance. See, e.g., Texas Order ¶¶ 88-90.

B. Loop Provisioning

A few commenters allege that SBC's loop provisioning processes result in so-called "unproductive truck rolls." Specifically, these parties contend that, in some instances, even though the CLEC has received a SOC indicating that a new line has been provisioned, the CLEC's inside wire vendor arrives at the customer premises to find that the line is not in fact

proposition, see supra Part I (discussing AT&T's allegations with respect to billing); Part IV.A (same with respect to collocation power) – it represents an extremely low percentage of AT&T orders on which the scenario described above could have occurred. See Muhs Reply Aff. ¶ 9; see also id. ¶ 15 (discussing installation trouble reports for Forte). For another, the process described above is followed regardless of whether the new cut-through order is a retail or a wholesale order, id. ¶ 5, and commenters have provided no reason to think that the CLECs are experiencing a disproportionate share of "unproductive truck rolls." Such "unproductive truck rolls" therefore do not reflect discrimination of any kind, nor are they depriving CLECs of a meaningful opportunity to compete.

Even so, SBC Midwest is taking steps to reduce the frequency of these occurrences still further. In particular, SBC Midwest has put in place procedures to reinforce the process of re-testing a line after taking any corrective action spawned by an unsuccessful PST. See Muhs Reply Aff. ¶ 8. In addition, SBC has verified the programming script that runs the PST itself to ensure that it works properly. Id. With these steps in place, SBC Midwest hopes and expects "unproductive truck rolls" will become even more rare for both it and the CLECs alike. But, in any event, as noted, the SBC Midwest processes in place today are nondiscriminatory and provide CLECs a meaningful opportunity to compete. Nothing more is required to satisfy the checklist.

C. Reciprocal Compensation for the Exchange of Local Traffic

AT&T alleges that Ohio Bell fails to pay tandem rates for the termination of local traffic in accordance with 47 C.F.R. § 51.711(a)(3). See AT&T Comments at 51-52. In particular, AT&T takes issue with a PUCO decision that awarded AT&T tandem rates in most

circumstances, except where AT&T has established direct trunks to an Ohio Bell end office. See id.; see also Arbitration Award, AT&T Communications of Ohio, Inc.'s and TCG Ohio's Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ameritech Ohio, Case No. 00-1188-TP-ARB (PUCO June 21, 2001) (App. E-OH, Tab 38).

For one thing, however, the contract language AT&T attacks is irrelevant to this proceeding. Ohio Bell does not rely on the AT&T agreement to meet its obligations under Checklist Item 13, but relies instead on its agreement with Ohiotelnet.com. See Alexander Reply Aff. ¶ 58. And, as the Commission has held, "substantive arguments" directed at interconnection agreement language that a BOC applicant "does not rely on . . . to demonstrate compliance" with the checklist are beside the point. California Order ¶ 115 n.418. Insofar as it is relevant here, Ohio Bell's agreement with Ohiotelnet.com mirrors in all relevant respects the language of Commission Rule 51.711(a)(3), and indeed no party disputes that it satisfies the requirements set out in that Rule. See Alexander Reply Aff. ¶ 58. The Commission need go no further to resolve this issue. See Texas Order ¶ 78.

That is especially so in view of the fact that AT&T's challenge to the PUCO's resolution of this issue – as well as Ohio Bell's cross-challenge – is now pending in federal district court. See Alexander Reply Aff. ¶ 57. As the Commission has held time and again, "[t]he 1996 Act authorizes the state commissions to resolve specific carrier-to-carrier disputes arising under the local competition provisions, and it authorizes the federal district courts to ensure that the results of the state arbitration process are consistent with federal law." Texas Order ¶ 88. And, "[a]lthough [the Commission] ha[s] an independent obligation to ensure compliance with the

checklist, section 271 does not compel [it] to preempt the orderly disposition of intercarrier disputes" in this manner. Id. The Commission has emphasized that "federal courts must be presumed to apply the law correctly." Id. ¶ 237. Resolution of AT&T's complaint here – particularly where the agreement language in question is not even relied upon by Ohio Bell – would reflect a profoundly contrary view, and would conflict with the Commission's practice of deferring such issues where it is clear they will be resolved appropriately in the ordinary course. See California Order ¶ 143 (rejecting similar claim under Checklist Item 13 on the basis of the Commission's "confidence" that it would be "resolve[d] . . . consistent with [Commission] rules" pursuant to the procedural requirements set out in the Act).

In the unlikely event the Commission elects to resolve this issue on the merits – and thereby to intrude on a matter now pending in federal district court – it should reject AT&T's claim out-of-hand. By its terms, AT&T's argument is predicated on the assertion that Commission Rule 51.711(a)(3) requires an ILEC to pay tandem switching rates to a CLEC in any case in which the CLEC demonstrates that its switch is "*capable* of 'serv[ing] a geographic area comparable to the area served by [the ILEC's] tandem switch.'" AT&T Comments at 51 (quoting 47 C.F.R. § 51.711(a)(3)) (emphasis added); see id. at 53. The Commission's rule does not, however, use the term "capable of," nor does it suggest that a CLEC is entitled to tandem rates merely if it can show that its switch *could* serve an area comparable to the ILEC's tandem switch. Instead, the rule states that compensation at tandem rates is appropriate where the CLEC switch "serves" a geographic area comparable to that of the ILEC. 47 C.F.R. § 51.711(a)(3). Accordingly, numerous courts have recognized that the so-called "geographic use" test created by this rule requires the CLEC to demonstrate, at a minimum, that its switch *actually* serves an

area comparable to that of the ILEC tandem, not that it conceivably could do so. See, e.g., MCI WorldCom Communications, Inc. v. Pacific Bell Tel. Co., No. C-00-2171 VRW, 2002 WL 449662, at *5 (N.D. Cal. Mar. 15, 2002); MCI Telecomms. Corp. v. Michigan Bell Tel. Co., 79 F. Supp. 2d 768, 791 (E.D. Mich. 1999).

The only support AT&T can muster for its view to the contrary is the staff's order in the Virginia Arbitration proceeding.[39] But, as the Commission itself has explained, the Virginia Arbitration Order is an "interlocutory staff ruling" that is presently on review before the full Commission, which is "currently considering whether to vacate, modify or affirm it."[40] That order is accordingly not final, and any perceived inconsistency between it and the PUCO's resolution of this issue provides no basis for concluding that Ohio Bell fails to satisfy Checklist Item 13. See, e.g., Pennsylvania Order ¶ 92 ("new interpretative disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding").

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[39] Memorandum Opinion and Order, Petition of WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, 17 FCC Rcd 27039 (2002) ("Virginia Arbitration Order").

[40] Brief for Respondents Federal Communications Commission and United States at 31-32, Mountain Communications, Inc. v. FCC, No. 02-1255 (D.C. Cir. filed June 19, 2003); see also Arbitration Award, Petition of Global NAPs Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North Inc., Case No. 02-876-TP-ARB, at 10 (Ohio PUC Sept. 5, 2002) (the Virginia Arbitration Order is not a "final decision nor a legally binding precedent"); Opinion and Order, Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. A-310814F7000, at 17 (Pa. PUC Apr. 17, 2003) (the Virginia Arbitration Order is "not conclusive" with respect to the matters it addresses).

D. Public Interest

SBC demonstrated in the Application that there is overwhelming evidence, including the repeated findings of this Commission itself, that section 271 approval accelerates both local and long-distance competition. See SBC Br. at 124-30. An empirical study concludes that BOC entry in New York and Texas resulted in a substantial reduction – from 9% to 23% – in the amount consumers pay for long distance.[41] The same study found statistically significant evidence that CLECs have a substantially higher share of the local exchange market in states where BOC entry has occurred.[42] As Chairman Powell has noted, "[w]e see a correlation between the process for approving applications and growing robustness in the markets."[43]

Commenters do not dispute that Bell company entry leads to lower long-distance prices and increased competition in the local market. Nor do they question the public-interest benefits that go along with these results. Instead, they offer conjectural scenarios in which these benefits might be outweighed by other factors unique to the states covered by this Application. This guesswork, however, falls far short of rebutting the well-established presumption that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist." Georgia/Louisiana Order ¶ 281.

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[41] See Jerry A. Hausman, Gregory K. Leonard & J. Gregory Sidak, The Consumer-Welfare Benefits from Bell Company Entry into Long-Distance Telecommunications: Empirical Evidence from New York and Texas 3 (Jan. 2002), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=289851.

[42] See id.

[43] See Rodney L. Pringle, Powell Says Innovation Will Drive Telecom Upswing, Communications Today, June 6, 2001.

DLC/Project Pronto Unbundling. ACN contends that Illinois Bell's entry into long distance would be contrary to the public interest not because of anything Illinois Bell is doing today, but because of something it purportedly did in the past. Specifically, ACN objects that Illinois Bell has "[d]enied [c]ompetitors' [sic] [a]ccess to DLC [l]oops." ACN et al. Comments at 44-51.

As an initial matter, Illinois Bell has done no such thing. As the Affidavit of William C. Deere explains, Illinois Bell offers CLECs access to loops served by universal digital loop carrier ("UDLC"). See Deere IL Aff. ¶¶ 100-101. And, although it is technically infeasible to provide such access to a loop served by integrated digital loop carrier ("IDLC"), where a CLEC orders such a loop, Illinois Bell moves the requested loop to a spare, existing loop at no additional charge. See id. ¶ 101. Indeed, even where there is no spare loop, Illinois Bell will perform the construction necessary to install one in accordance with its "facilities modification," or "FMOD," policy. Id. ¶¶ 101, 103-119; see Deere Reply Aff. ¶¶ 4, 7 (Reply App., Tab 7).

ACN nevertheless argues that Illinois Bell's policies in this regard have "frozen many end users on the ILEC network." ACN et al. Comments at 46. This claim has no basis in reality. As of May of this year, Illinois Bell used IDLC to serve a grand total of 3% of working loops, and it had not identified any IDLC loops in locations without alternative loops available. See Deere IL Aff. ¶ 100; Deere Reply Aff. ¶ 5. Moreover, Illinois Bell's prospective policy is to install at least one UDLC at each location where IDLC is used. See Deere IL Aff. ¶ 102. In light of these facts and this policy, it is unsurprising that ACN fails to identify even a single customer who is in fact "frozen" on the ILEC network as a result of the deployment of IDLC.

Aside from its misplaced concerns about the prevalence of IDLC loops, ACN makes much of the purported refusal of Illinois Bell to "unbundle" the packet-switching facilities associated with Project Pronto. See ACN et al. Comments at 47. It is clear, however, that no such unbundling is required under the applicable rules.[44] Under those rules, packet switching equipment need not be unbundled unless, among other things, Illinois Bell has refused to permit CLECs to collocate at the Illinois Bell remote terminal. UNE Remand Order[45] ¶ 313. The evidence in the record makes clear that Illinois Bell permits such collocation. See Chapman Aff. ¶¶ 79-81. For this reason (among others), the Commission's rules do not require unbundling of the packet-switching functionality contained in Project Pronto. See Kansas/Oklahoma Order ¶¶ 244-245 (declining to require unbundling of Project Pronto facilities under the checklist in the absence of "a specific factual situation" that would suggest such unbundling was required).

Indeed, ACN appears to concede as much, and for that reason raises this claim under the "public interest" standard instead of the checklist. But, for one thing, the Commission is statutorily barred from expanding the "public interest" inquiry to encompass requirements within the scope of, but not required by, the checklist. See 47 U.S.C. § 271(d)(4) ("[t]he Commission may not, by rule or otherwise, . . . extend the terms used in the competitive checklist"). And, in any event, the Commission itself has already rejected the notion that the deployment of Project Pronto is contrary to the public interest. As the Commission expressly found, Project Pronto was

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[44] See Texas Order ¶ 22 ("[W]e evaluate [a BOC's] compliance with our rules and orders in effect at the time the application was filed.") (emphasis added); New York Order ¶¶ 34, 236.

[45] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696 (1999) ("UNE Remand Order"), petitions for review granted, United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1571 (2003).

designed to "speed the deployment of advanced services to consumers throughout SBC's territory, some 20 million of whom [we]re unable to receive any DSL service" previously. Second Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control, 15 FCC Rcd 17521, ¶ 28 (2000). Moreover, Project Pronto "pave[d] the way" for CLECs "to compete for those consumers" by creating a brand new entry vehicle – the wholesale Broadband Service Offering – that CLECs could access in order to provide service in markets that were previously out of reach. Id.

To the extent ACN's complaint is rooted in the notion that the "public interest" standard required Illinois Bell to go *further* – and to make the packet switching capability encompassed in Project Pronto available on an unbundled basis – that claim too is contrary to Commission precedent. In the UNE Remand Order, the Commission declined to unbundled packet switching generally on the theory that a contrary result would stifle the incentives of carriers to use such technology, *in contradiction to section 706 of the 1996 Act.* See UNE Remand Order ¶¶ 314-316. It is inconceivable that, in acting on the incentives created by the Commission's own order, Illinois Bell can be said to have acted contrary to the public interest.

Performance Remedy Plans. AT&T disputes the adequacy of SBC's plans in Illinois, Ohio, and Wisconsin, on the theory that they are not "self-executing." AT&T Comments at 86. But the remedies in the plan are in fact "self-executing" as the Commission has used that term in prior orders – i.e., the remedy amounts as a general matter are payable automatically, and SBC is permitted to dispute those amounts only "in certain carefully designated circumstances." Texas Order ¶ 427; see Ehr Reply Aff. ¶¶ 27-30 & nn.34, 38 (Reply App., Tab 8).

What AT&T is really objecting to is not the "self-executing" nature of the plans, but rather the fact that SBC has not made an open-ended agreement to incorporate any changes that AT&T can dream-up and convince a state commission to adopt. Instead, SBC has reserved its right to challenge such changes in the appropriate forum. But that reservation of rights is not unique to the remedy plans AT&T challenges here; on the contrary, it was originally developed in Texas during negotiations with CLECs about the remedy plan that this Commission approved in Texas, Kansas, Oklahoma, Missouri, and Arkansas. See id. ¶ 31. Moreover, SBC's reservation of rights has nothing to do with the *current* requirements of the remedy plans at issue, and it is therefore irrelevant to the question whether those plans provide an incentive to avoid back-sliding in the wake of section 271 relief. As SBC has previously explained, the plans plainly provide such an incentive, and they are therefore sufficient for purposes of section 271. See Ehr IL Aff. ¶ 186; Ehr OH Aff. ¶ 169; Ehr WI Aff. ¶ 164; see also Ehr Reply Aff. ¶ 25 & n.30.[46]

Commenters also contend that, although the amount of revenues at stake in each of the performance plans at issue is equivalent to that at stake in numerous plans the Commission has approved, these plans are different because, here, the BOC Applicants are unlikely to pay the full amount. See, e.g., MCI Comments at 11; OCC Comments at 10-12. For one thing, however, this complaint is not new. CLECs made it – and the Commission rejected it – in Kansas and Oklahoma. Compare, e.g., Petition to Deny of Sprint Communications Company, L.P. at 70-72,

[46] AT&T's complaint that it did not have "any input" in the Ohio plan, AT&T Comments at 87, is both untrue and irrelevant. As the record makes clear, AT&T was in fact heard by the PUCO on the question of performance remedies. See Ehr Reply Aff. ¶¶ 46-47. In any case, the Ohio plan was adopted from the plan in place in Texas, which AT&T played a central role in designing (and which, of course, this Commission approved in the Texas Order).

Joint Application by SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217 (FCC filed Nov. 15, 2000) (noting that "SWBT's caps for Kansas and Oklahoma are calculated in a manner consistent with Bell Atlantic's cap in New York and SWBT's cap in Texas," but contending that the remedies were structured in a way that would make actual payments "exceptionally small"), with Kansas/Oklahoma Order ¶ 274 ("We . . . disagree with commenters that suggest that [the amount at risk in the Kansas and Oklahoma plans] is insufficient and fails to provide adequate assurance of SWBT's compliance in the future.").

In any event, the total amount of revenue at stake in these plans is largely beside the point. Indeed, because the BOC Applicants' wholesale performance is so outstanding – and because it has every incentive to continue providing such performance in the wake of 271 relief – SBC agrees that it is unlikely that it will ever pay the total amount of revenue at stake in the plans. Instead, the relevant question is whether the performance payments generally are structured in a way that provides the BOC Applicants a meaningful incentive to continue to provide nondiscriminatory service.

Particularly when considered in connection with the many other incentives the BOC Applicants have to provide such service, the plans in question easily satisfy that test. As the Reply Affidavit of James Ehr explains, the Ohio plan has the same remedy structure as the Texas plan. See Ehr Reply Aff. ¶ 30 & n.39. And the "structural elements" of the Texas plan, the Commission has held, are "reasonably designed to detect and sanction poor performance when it occurs." Texas Order ¶ 426. As for the Illinois, Indiana, and Wisconsin plans, the payment structure is modeled on the Texas plan, but with *less* statistical testing to minimize misses due to

random variation; *more* sustained increased payments resulting from consecutive months of performance misses; and the application of a procedural cap – instead of a strict limit – on the total of payments required to be made under the plans. See Ehr Reply Aff. ¶ 30 & n.38. These differences render the plans more severe, not less, and therefore more worthy of this Commission's approval in this context.

Finally, the IURC suggests that, because Indiana Bell has successfully challenged the performance plan that the IURC attempted to impose, it may need FCC "assistance" in enforcing the one to which SBC has agreed. IURC Comments at 4. The performance plan on which Indiana Bell relies in this Application is part of interconnection agreements. See Ehr IN Aff. Attach. A, § 5.4; Ehr Reply Aff. ¶ 33. The terms of that plan are therefore subject to interpretation and enforcement by the IURC. See, e.g., MCI Telecomms. Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 338 (7th Cir. 2000) ("A state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission."). In addition, if the IURC were to abdicate its authority to interpret and enforce this portion of Indiana Bell's interconnection agreements, this Commission has held that it may act in its place. See Memorandum Opinion and Order, Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission, 15 FCC Rcd 11277, ¶ 6 (2000). There is accordingly no reason to doubt that Indiana Bell's performance plan will be as effective in Indiana as SBC's other plans have been elsewhere. See Arkansas/Missouri Order ¶ 131 ("We disagree with commenters that submit that the Arkansas Commission may have insufficient legal authority to effectively enforce the [remedy] plan").

CONCLUSION

The Application should be granted.

Respectfully submitted,

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August 29, 2003

DOCKET NO. 03-167 Attachment A

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